U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 March 2007 In the Matter of

W. H. B.
Claimant

Case No. 2006 BLA 00029

v.

BRANHAM AND BAKER UNDERGROUND.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
William L. Roberts, Esq.
For the Claimant
Timothy J. Walker, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

DENIAL OF EMPLOYERS REQUEST FOR MODIFICATION

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Employer, October 21, 2005. Director's Exhibit ("DX") 111.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

The claimant, William Bentley, originally filed an application for benefits on June 29, 1998. After a hearing on August 22, 2000, in Pikeville, Kentucky, Judge Thomas Phalen awarded benefits on October 25, 2000. The Employer thereafter appealed the award to the

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

Benefits Review Board, the "Board." On October 19, 2001, the Board issued a Decision and Order affirming in part and vacating in part the October, 2000 decision. In a second opinion. Judge Phalen again awarded benefits on April 9, 2002. He determined:

> Dr. Younes unequivocally found that Claimant suffers from pneumoconiosis due to cigarette smoking and coal dust exposure. Dr. Baker concluded that both coal dust exposure and smoking caused Claimant's respiratory impairment. Dr. Potter concluded that the primary etiology was coal and rock dust exposure. As discussed above, their conclusions are supported by the medical data. In addition, Claimant's work history (32 years performing underground coal mining work) and moderate smoking history corroborate their conclusions.[2]

He discounted the weight of the Employer's experts' opinions because they failed to diagnose pneumoconiosis. The Decision and Order was affirmed by the Benefits Review Board on April 29, 2003.

The Employer did not appeal the Benefits Review Board decision; however, a request for modification was filed by the Employer on October 9, 2003.

In Pre-hearing Motions, Employer requested that I compel Claimant to submit to an Employer's physical examination. On August 23, 2006 I entered an Order denying Employer's Motion. On September 6, Claimant advised that he would not use Dr. Simpao's report. Employer argued that it had the right to an examination. On October 16, I ordered the other parties to respond. Both the Claimant and the Director filed briefs alleging that although the Employer has a right to seek modification, it does not have a right to a new examination of the miner, unless the Employer can show that such a request is reasonable. I found that the Employer failed to set forth a factual basis for the request. Therefore, the Claimant was not re-examined.

A hearing was held on November 1, 2006 in Pikeville, Kentucky. The Claimant appeared but was too ill to testify; however, his wife testified. One hundred fourteen Director's exhibits, DX 1-DX 114, Transcript, "TR" at 7, were entered into evidence. Post hearing, briefs were submitted by both parties. The Claimant also submitted a reply to Employer's brief.

The Claimant's wife testified that Dr. Potter is still the treating physician and has been treating the Claimant once a month for about eight years. TR 11. He prescribed oxygen and albuterol due to shortness of breath.

The Claimant left mining in 1998 and since then has been "getting weaker every day". She helps bathe and dress him. Id. 12-13.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

This case represents a claim for benefits under regulations in force prior to January 21, 2001. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore***

[2] "Work history is an important diagnostic tool in determining etiology" of a miner's impairment. ***Hall v. Consolidation Coal Co.,*** 6 B.L.R. 1-1306 (1984).

and Sons, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc). The Claimant established these elements, and Employer seeks modification.

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The Claimant is a "miner" as that term is defined by the Act, and has worked after 1969. TR 7.

3. The Employer agreed that the Claimant had 32 years of coal mine employment. TR 8.

4. Torie Mining Company is the responsible operator. TR 8.

5. The Claimant has one dependent. TR 8. DX 113.

After a review of the stipulations and the record, they are accepted.

REMAINING ISSUES

1. Whether the miner suffers from pneumoconiois.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled from a respiratory impairment.
4. Whether the miner's total disability is due to pneumoconiosis.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[3] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[4] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[5]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

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[3] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[4] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[5] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

MODIFICATION

The modification provision in 20 CFR §725.310 states that upon the initiative of the deputy commissioner or at the request of any party, the fact finder may reconsider a denial of benefits within one year of that denial. 20 C.F.R. §725.310. The fact finder is authorized to modify an award or a denial of benefits based upon a change in conditions or a mistake in a determination of fact. In determining whether Employer has established a change in conditions pursuant to §725.310, an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, must be performed, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. See **Nataloni v. Director, OWCP,** 17 BLR 1-82(1993).

In ***Cumberland River Coal Co. v. Caudill***, 2006 WL 3345416, Case No. 05-3680 (6th Cir. Nov. 17, 2006) (unpub.), the court held that Employer is not entitled to "de novo" discovery, including requiring Claimant to submit to an Employer-sponsored pulmonary evaluation, simply because it files a petition for modification under § 725.310 of the regulations.

In a petition for modification, ***Rose v. Buffalo Mining Co***., ___ B.L.R. ___, BRB No. 06-0207 BLA (Jan. 31, 2007), the Board adopted the Director's position that the § 725.310(b) evidentiary limitations "supplement," rather than "supplant," the § 725.414 limitations. The Board reasoned:

> [W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414, i.e., additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit additional medical evidence allowed by 20 C.F.R. § 725.310(b).

Slip op. at pp. 6-7.

In ***Jonida Trucking, Inc. v. Hunt***, 124 F.3d 739 (6th Cir. 1997), the Sixth Circuit reiterated that, in a claim involving a petition for modification, "the fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions." It noted that the standard for opening the record on modification is "very low." See also ***King v. Jericol Mining, Inc***., 246 F.3d 822 (6th Cir. 2001) (modification is available to claimants and employers).

20 CFR § 725.310(b) limits each party's submission of initial evidence "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414" (emphasis in original). The court concluded that "[t]he portions of § 725.414 that are specifically incorporated into modification proceedings by § 725.310(b) apply only to rebuttal evidence, ..." ***Cumberland River Coal Co. v. Caudill,*** *supra.*

MEDICAL EVIDENCE SUMMARY

CHEST X-RAY EVIDENCE

Exhibit No.	Physician	B-Reader /Board Cert.(BCR)	Date of X-ray	Date of Reading	Film Quality	Reading
DX 28	Kattan	B	4/26/74	6/19/74	1	Negative
DX 28	Combs	B	7/13/77	7/13/77	1	Negative

DX 28	Navani	B	7/26/79	7/26/79	2	Negative
DX 28	Morgan	B	10/1/80	11/9/80	1	Negative
DX 28	Harrison	B	6/8/81	?/?/81	2	Negative
DX 12	Baker	B	6/26/98	7/1/98	1	1/0
DX 14	Sargent	B/BCR	6/26/98	9/22/98	1	Negative
DX 83	Halbert	B/BCR	6/26/98	12/9/03	2	0/0
DX 109	Barrett	B/BCR	6/26/98	7/26/05	1	Negative
DX 11	Younes	B	7/15/98	7/15/98	1	1/1
DX 11	Sargent	B/BCR	7/15/98	7/31/98	1	Negative
DX 11	Barrett	B/BCR	7/15/98	8/19/98	1	Negative
DX 83	Halbert	B/BCR	7/15/98	12/9/03	2	0/0
DX 109	Barrett	B/BCR	7/15/98	7/26/05	2	Negative
DX 24	Baker	B	11/18/98	11/18/98	1	1/0
DX 26	Mathur	B/BCR	11/18/98	1/18/99	1	1/1
DX 93	Vuskovich	B	11/18/98	5/30/04	1	1/0
DX 103	Spitz	B/BCR	11/18/98	8/29/04	1	Negative
DX 106	Wiot	B/BCR	11/18/98	8/17/04	2	Negative
DX 109	Barrett	B/BCR	11/18/98	7/26/05	1	Negative
DX 25	Broudy	B	12/22/98	12/22/98	1	0/1
DX 33	Potter		8/4/99	8/4/99	1	1/2
DX 36	Mathur	B/BCR	8/4/99	10/19/99	1	1/1
DX 43	Fino	B	8/4/99	8/1/00	1	Negative
DX 42	Potter		7/5/00	7/6/00	1	1/2
DX 44	Mathur	B/BCR	7/5/00 (mislabeled 7/15/00)	8/5/00	1	1/1
DX 50	Fino	B	7/5/00	9/14/00	1	Negative

MEDICAL REPORTS

Exhibit No.	Physician	Date of Report	Comments
DX 11	Younes	7/15/98	Totally disabled; black lung.
DX 24	Baker	11/18/98	Black lung; totally disabled.
DX 25	Broudy	12/22/98	No CWP. Retains respiratory capacity for CME. Impairment is due to cigarette smoking.
DX 33	Potter	8/4/99	Totally disabled; black lung due to CME as miner.
DX 34	Potter	9/7/99	Dr. Potter is treating claimant for respiratory condition.
DX 42	Potter	7/24/00	CWP; moderate impairment.
DX 43	Fino	7/31/00	Review of all records shows smoking-related impairment, no CWP. Not disabled from CME.
DX 50	Fino	9/14/00	Review of additional records does not alter previous opinion.
DX 89	Broudy (depo)	1/26/04	PFTs and ABGs non-qualifying. Mild to moderate impairment, but w/ significant improvement after bronchodilators. Can return to CME. Obstructive impairment that responds to bronchodilator w/ no restrictive component. Attributable to smoking, not to coal dust exposure.

DX 108	Potter	4/22/05	CWP; exposure to coal and rock dust. Moderate impairment/totally disabled due to COPD and CWP.

PULMONARY FUNCTION STUDIES

Exhibit No.	Physician	Date of Study	Tracings Present?	Flow-vol. Loop?	Broncho-dilator	FEV1	FVC/MVV	Coop. and Comp. Noted?
DX 11	Younes	7/15/98	Yes	Yes	Pre Post	2.43 3.01	4.57/94 4.97	good
DX 24	Baker	11/18/98	Yes	No	Pre	3.58	4.44/-	no
DX 25	Broudy	12/22/98	Yes	Yes	Pre Post	2.42 2.82	4.55/83 5.21/89	Fair/Good
DX 33	Potter	8/4/99	Yes	No	Pre Post	2.59 2.90	4.22/- 4.67/-	Good
DX 42	Potter	7/24/00	Yes	No	Pre Post	2.33 2.63	3.89/- 4.54/-	Good

BLOOD GAS STUDIES

Exhibit No.	Physician	Date of Study	Altitude	Resting® Exercise(E)	PCO2	PO2	Comments
DX 11	Younes	7/15/98	0-2999	R	36.3	77.6	
DX 24	Baker	11/18/98	0-2999	R	37.7	88.3	
DX 25	Broudy	12/22/98	0-2999	R E	38.1 30.9	77.8 104.8	

"NEW" MEDICAL TESTIMONY

Dr. Bruce Broudy was "deposed" on January 26, 2004. He was not subjected to cross examination. His original report is designated as DX 25, and his deposition transcript is in the record as DX 89.

Dr. Potter also testified by deposition on 2/10/04; his deposition transcript is contained in the record as DX 91. In August 1999, he performed a "black lung" evaluation for a state workers' compensation claim. (DX 91, p. 8) He classified the chest x-ray as category 1/2 and found an FEV 1 score of 76% of predicted, indicating mild obstructive impairment. (DX 91, p. 9) His findings in the examination on July 5, 2000, were virtually identical to those found in August 1999, except that the FEV1 was 78% of predicted. He concluded that the claimant did not retain the respiratory capacity to perform the work of a coal miner, based on his x-ray interpretation and the pulmonary function scores. (DX 91, pp. 12-13).

FINDINGS OF FACT

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[6] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[7] The regulation further indicates that a lung disease arising out of coal mine employment includes

[6] 20 C.F.R § 718.201(a).
[7] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The record involves twenty seven (27) readings of eleven (11) x-rays. Nine (9) of the twenty nine were read as positive. I note that of these, five were taken more than seventeen years prior to the Department of Labor examination in 1998. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-;Robbins Coal Co***., 12 B.L.R. 1-;149 (1989)(en banc); ***Casella v. Kaiser Steel Corp***., 9 B.L.R. 1-;131 (1986). Therefore, I attribute little weight to the five x-rays taken from 1974 to 1981. That reduces the number of total readings to twenty two. Of four x-rays taken in 1998, sixteen readings yield five positive and nine negative readings.

The most recent readings stem from a July 5, 2000 x-ray, and the Claimant relies in large part on readings by a dually qualified, board certified radiologist B reader, Dr. Mathur. The Employer relies on readings by Dr. Fino, who is a B reader, but who is not dually qualified.

The weight I must attribute to the x-rays submitted for evaluation with the current application are in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that of the readers of record, of the 1999 and 2000 x-rays, Dr. Mathur is the best qualified. I also note that the preponderance of the readings for 1999 and 2000 are positive, four (4) to two (2) and both of those negative readings were read by Dr. Fino, and Dr. Marthur read both of the same x-rays as positive, both 1,1.

The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

In this case, the expert opinions of the most qualified reader of the more recent x-rays dictate a conclusion that outweighs the numerical number of total number opinions.

I give credit to Dr. Mathur's opinion, based on his qualifications. I find that pneumoconiosis has been established by x-ray by a preponderance of the evidence.

Biopsy and Presumption

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence. The presumptions do not apply.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Although the Claimant has established the presence of clinical pneumoconiosis, the interests of justice require that I discuss legal pneumoconiosis.

"Legal pneumoconiosis is a much broader category of disease" than medical pneumoconiosis, which is "a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray." ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 at 210 (4th Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease "arising out of coal mine employment" is one that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576 (6th Cir. 2000).

Dr. Younes examined the Claimant in July 1998. Based on the Claimant's working history, smoking history, a chest x-ray, and arterial blood gas study, Dr. Younes diagnosed the Claimant with pneumoconiosis and chronic obstructive pulmonary disease. Dr. Younes explained that the causes of Claimant's respiratory problems included both coal dust exposure and cigarette smoking. However, Dr. Younes also wrote that the primary etiology was smoking and that dust exposure "may be" a contributing factor. Despite Dr. Younes use of the term "may be," I note that his statements on the CM-988 regarding the diagnosis of pneumoconiosis itself being due to coal dust exposure were unequivocal.

Dr. Baker examined Claimant in November 1998. Based on Claimant's smoking and work histories, his physical examination and a chest x-ray (6), he determined that Claimant was suffering from chronic obstructive airway disease with mild obstructive ventilatory defect and pneumoconiosis. Dr. Baker also noted that Claimant's pulmonary impairment was caused in part by coal dust exposure and in part by cigarette smoking.

Dr. Potter issued two reports and recently provided a deposition. Although a history of smoking was noted, the Claimant stopped smoking in January, 1999. In the deposition, Dr. Potter testified that it was his understanding that the Claimant started smoking at about age 17 and stopped at about age 53. DX 91, 5-6. The Claimant complained of shortness of breath, difficulty breathing, dizziness, fatigue, sputum, and difficulty working, walking and doing household chores. Dr. Potter based his diagnosis on Claimant's history, pulmonary function studies, and chest-x-rays. In the deposition, Dr. Potter reiterated that the Claimant has both clinical and legal pneumoconiosis. At 17.

I note that in his initial report, Dr. Broudy stated that the chest x-rays revealed several scattered calcifications in either lung, as well as some post-inflammatory fibrotic type change in the right mid zone. According to this analysis, they also revealed a slight degree of interstitial change categorized as 0/1, q/t in the right mid and upper zone. Dr. Broudy stated that the profusion of opacities was not sufficient to be diagnostic of coal workers' pneumoconiosis. I take that to mean "clinical" pneumoconiosis.

The Employer argues that in the original proceeding, Judge Phalen found fault with Dr. Broudy's opinion on causation because his report did not explain his conclusion. At his "deposition," Dr. Broudy acknowledged that exposure to coal dust can be a cause of respiratory impairment even in a miner who does not yet present x-ray evidence of medical pneumoconiosis. (DX 89, p. 10). However, he stated that in this particular case, Claimant's cigarette smoking history is of such a duration and intensity as to account for all of the respiratory impairment and symptoms, and that there is no basis to infer that Claimant has any greater impairment or symptoms due to his coal mine employment than those he would have had, anyway, because of his cigarette smoking alone, even if he had never gone into a coal mine. (DX 89, pp. 11-12). He stated that the primary defect he found in Claimant was obstructive, "which is typical in cigarette smokers". Further, there was responsiveness after administration of bronchodilators, something that is common in a cigarette smoker but happens "very rarely" in patients with impairment due to coal dust exposure. (DX 89, pp. 12-13) Finally, Dr. Broudy testified that, even if he had found simple pneumoconiosis by x-ray, the other factors of the examination pointed to smoking rather than coal dust as the cause of impairment. (DX 89, p. 13).

In the "deposition", the following colloquy occurred:

> Q Now, you acknowledge, don't you, that there are other diseases of the lung that can be caused or aggravated by exposure to coal dust, but that don't reveal themselves on chest X—rays?
>
> A Yes.
>
> Q What would some of that be?
>
> A Well, for one thing, one can have coal workers' pneumoconiosis that is in its early stages that would only be detected by lung biopsy, for example, that would be pulmonary — that would be coal workers' pneumoconiosis. There's another disease called industrial bronchitis, which is basically chronic bronchitis caused by dust exposure. The disease is diagnosed only by history and the symptoms usually subside with cessation of exposure, and usually there's no respiratory impairment associated with it.

At 10. And further,

> Q Were there features of the findings in your examination of Claimant that made it appear more likely from a medical standpoint that his symptoms and impairment were caused by smoking rather than by coal dust exposure?
>
> A Yes, they were.
>
> Q And what were those findings and features of your examination?
>
> A Well, for one thing, the primary defect was obstructive, which is the physiological pattern one would expect to see with cigarette smoking in patients with this, With impairment due to coal dust exposure, one usually sees a restrictive defect, or at least a mixed defect. Furthermore, there was responsiveness to bronchodilation, which is common in asthma and sometimes in chronic obstructive airways disease due to cigarette

smoking, but not common; in fact, rarely present in patients with impairment due to coal dust exposure.

"Legal pneumonoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment, and includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 CFR § 718.201(a)(2). Dr. Broudy's emphasis of restrictive over obstructive disease is not consistent with the above language. The Board has held that an obstructive impairment may be regulatory pneumoconiosis. ***Heavilin v. Consolidation Coal Co.***, 6 B.L.R. 1-1209 (1984). I find that chronic obstructive pulmonary disease produced pneumoconiosis is not as "rare" as depicted. See ***Warth v. Southern Ohio Coal Co.,*** 60 F.3d 173 (4th Cir. 1995), chronic obstructive lung disease is encompassed in the legal definition of pneumoconiosis; ***Consolidation Coal Co. v. Swiger***, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), physicians who state that pneumoconiosis is associated with restrictive impairments and smoking is associated with obstructive impairments, "supported the ALJ's findings that the employer's physicians were overwhelmingly focused on clinical rather than legal pneumoconiosis." Pneumoconiosis includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 CFR 718.201. In fact, even cigarette smoking can interplay with compensable pneumoconiosis. ***Consolidation Coal Co. v. Director, OWCP [Williams]***, 453 F.3d 609 (4th Cir. 2006).

Dr. Broudy's logic also forecloses contribution to the effects of smoking by coal dust. The Act assumes that pneumoconiosis is progressive, and chronic obstructive pulmonary disease can be part of the progression. Asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. ***Robinson v. Director, OWCP***, 3 B.L.R. 1-798.7 (1981); ***Tokarcik v. Consolidation Coal Co.***, 6 B.L.R. 1-666 (1983). In ***Hughes v. Clinchfield Coal Co.***, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to the claimant's coal mine employment. [8]

He also fails to consider that legal pneumoconiosis can arise from a combination of respiratory causes: For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 CFR § 718.202 (b).

He also relied heavily on the negative x-ray readings. I credit the positive readings. For these reasons, I attribute little weight to his opinions.

I find that Dr. Fino also relied heavily on his readings of the x-rays, which I discount. I also note that Dr. Fino did not examine the Claimant, rather reviewed the records as of 1998 to

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[8] In several unreported cases, ALJs have been sustained in finding that industrial bronchitis is pneumoconiosis. ***Boggs v. Director***, 867 F.2d 611 (Table) (6th Cir., 1989); Industrial bronchitis was CWP. ***Florence Mining Co. v. Director, OWCP***, 188 Fed.Appx. 105 (3rd. Cir.,2006); ***Sea ""B" Mining Co***. v. Dunford, 188 Fed.Appx. 191, (4th Cir., 2006); ***Cyprus Cumberland Resources v. Director***, 170 Fed.Appx. 787 (3rd. Cir., 2006); ***Dante Coal Co. v. Director***, 164 Fed.Appx. 338 (4th Cir., 2006). There is an unpublished case wherein a Circuit court that affirmed the opposite. ***Pittsburg & Midway Coal Minin Co. v. Sanchez,*** 18 Fed.Appx. 722 (10th Cir., 2001). Dr. Broudy did not diagnose industrial bronchitis in this case, but his explanation shows that he thinks that pneumoconiosis will not develop after leaving mine work.

determine that the Claimant is not suffering from pneumoconiosis. However, he did note the obstructive abnormality, but reasoned that because the condition improves with bronchodilators, the impairment is caused by cigarette smoking because he concludes that pneumoconiosis is not reversible with the use of bronchodilators. This is the same logic employed by Dr. Broudy that would foreclose competently produced asthma as a basis for legal pneumoconiosis. Moreover as Dr. Fino never explained why after exposure underground in the mines for over thirty years has no impact on this record, Dr. Fino's medical report is entitled to limited weight. Moreover, as a non-examining physician, his opinion is entitled to less weight than the physicians who examined the Claimant where it is contrary to more competent evidence.

I find that Dr. Potter submitted a series of reports and his opinions are substantiated by the reports of Drs. Baker and Younes that constitute a "reasoned medical opinion" that establishes that legal pneumoconiosis is more than a de minimus factor in the Claimant's respiratory impairment. ***Grundy Mining Co. v. Director, OWCP [Flynn]***, 353 F.3d 467 (6th Cir. 2003).

CAUSATION

A miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 CFR 718.203(b). I have discounted the diagnoses of Drs Fino and Broudy, who do not accept a diagnosis of pneumoconiosis, which is contrary to the full weight of the evidence. ***Howard v. Martin County Coal Corp.***, 89 Fed.Appx. 487 (6th Cir., 2003, unpbl.). ["ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most." ***Scott v. Mason Coal Co***., 289 F.3d 263 (4th Cir. 2002)]. ***Tapley v. Bethenergy Mines, Inc***., BRB No. 04-0790 BLA (May 26, 2005) (unpub.). The record establishes 32 years of coal mine employment. I credit the opinions of Drs. Baker, Potter and Younes on this point. Therefore, I find that the miner's pneumoconiosis arose at least in part out of coal mine employment.

TOTAL DISABILITY

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

The record does not contain sufficient evidence that Claimant has complicated pneumoconiosis and there is no evidence of cor pulmonale with right sided congestive heart failure. As a result, the Claimant must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

In assessing total disability under 20 C.F.R. §718.204(c)(4) I must, as the fact-finder, compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. ***Cornett,*** *supra.* (a finding of

total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); ***Schetroma v. Director, OWCP***, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). See also ***Scott v. Mason Coal Co.***, 14 B.L.R. 1-37 (1990)(en banc on recon.).

Section 718.204(c)(4) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a claimant's respiratory or pulmonary condition prevents him from performing his usual coal mine or comparable work. The Claimant's usual coal mine work took place underground working as an electrician, a cutting machine operator, a continuous miner operator, and roof bolter operator. I find that this is "heavy" work. According to the Department of Labor ***Dictionary of Occupational Titles***, Appendix C, heavy work entails exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects.

Dr. Baker and Dr. Potter both note that smoking and pneumoconiosis significantly contributed to total disability. I accept the Claimant's testimony that his work required heavy lifting and requires significant stooping and crawling. I accept Dr. Baker's and Dr. Potter's findings that the Claimant has severe obstructive airway disease constituting both clinical and legal pneumoconiosis and which preclude past relevant work. Based on reasons more fully set forth above in the discussion of pneumoconiosis and total disability, I accept this premise.

Drs. Younes, Baker and Potter rendered opinions that Claimant is unable to return to his usual coal mine employment or comparable work due to his respiratory impairment. Dr. Baker even went so far as to note that Claimant is 100% occupationally disabled from working in the mines or similar dusty occupations.

I discount the opinions of Drs Fino and Broudy in large part because they failed to diagnose pneumoconiosis, contrary to my finding above. However, although Dr. Broudy rendered an opinion that the Claimant can work from a respiratory standpoint, even he renders an opinion that Claimant does have a mild to moderate impairment, which I find precludes a claimant from heavy work, despite his opinion to the contrary.

Therefore, I find that the Claimant has established total disability as one of the criteria under 20 CFR § 725.309.

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Claimant needs to establish that pneumoconiosis is a "substantially contributing cause" to his disability. A "substantially contributing cause" is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1). The Benefits Review Board has held that §718.204 places the burden on the claimant to establish total disability due to pneumoconiosis by a preponderance of the evidence. ***Baumgardner v. Director, OWCP***, 11 B.L.R. 1-135 (1986).

I credit Dr. Baker's, Potter's and Dr. Younes' reports that establish causation. Dr. Younes unequivocally found that Claimant suffers from pneumoconiosis due to cigarette smoking and coal dust exposure. Dr. Baker concluded that both coal dust exposure and smoking caused Claimant's respiratory impairment. Dr. Potter concluded that the primary etiology was coal and rock dust exposure. As discussed above, their conclusions are supported by the medical data. In addition, the 32 year work history performing underground coal mining work and moderate smoking history corroborate their conclusions. "Work history is an important

diagnostic tool in determining etiology" of a miner's impairment. ***Hall v. Consolidation Coal Co***., 6 B.L.R. 1-1306 (1984).

As their diagnosis is contrary to my finding on pneumoconiosis, I attribute less weight to the opinions of Drs Broudy and Fino. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, 576 (6th Cir. 2000).

In applying the Act the Benefits Review Board has ruled that as long as a totally disabling impairment was due to both cigarette smoking and coal dust exposure, that opinion establishes that part of the Claimant's impairment was due to cigarette smoking. See ***Crusenberry v. ABM Coal Company***, BRB No 06-271 (Unpublished, November 24, 2006), citing to ***Cornett***, *supra*, that the impairment was at least in part due to pneumoconiosis. In ***Crusenberry***, the Board evaluated an opinion of Dr. Baker and Dr. Potter that is similar to the opinion rendered in this record.

Therefore, I find that pneumoconiosis was a substantial contributing cause to the miner's disability. 20 C.F.R. §718.204(c)(1).

CONCLUSION

The Claimant has proved that his condition has changed and that he has proved all of the elements formerly held against him, 20 CFR § 725.309 and is entitled to modification under 20 CFR § 725.310.

ENTITLEMENT

I find that Claimant has established entitlement to benefits. Pursuant to 20 CFR §725.503, benefits are payable as of the month of onset of total disability and if the evidence does not establish the month of onset, benefits are payable beginning with the month during which the claim was filed.

In July 1998, Dr. Younes noted that Claimant did not have the respiratory capacity to perform the work of coal miner or comparable work in a dust free environment. In November 1998, Dr. Baker noted that Claimant was 100% disabled from working in the mines and similar dusty occupations. Dr. Potter, in August 1999, found that Claimant was impaired from performing his usual coal mine work or comparable work in a dust-free environment. Based on this evidence, I cannot determine the exact date of onset of total disability. Therefore, benefits must be payable commencing with the month during which the claim was filed. The Claimant filed his claim on June 29, 1998. As such, I find that June 1998 is the proper onset date and Mr. Leslie and his wife are entitled to benefits commencing as of this date.

Therefore, I find that benefits are payable as of the month during which Claimant perfected the claim, June, 1998.

ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby granted for the Claimant's counsel to submit an application. ***Bankes v. Director***, 8 BLR 2-l (l985). The application must conform to 20 C.F.R. 725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such

application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

Modification of the claim for benefits filed by **W. H. B.** is hereby **GRANTED**. Augmentation benefits for one dependent are also granted.

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).